

Civil Rights for People With Disabilities: Obstacles Related to the Least Restrictive Environment Mandate

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State and other social service agencies as well as service providers are governed by laws that often provide unclear guidance regarding the rights of people with disabilities. Although some standards can be, and have been, developed to protect the rights of people with disabilities, all people with disabilities are not the same and therefore, each can require very different types of accommodations. Some aspects of disability rights must be individually based, including the requirement that people with disabilities receive educational services in the least restrictive environment and care in the most inclusive setting. The current interpretation of these mandates suggests that agency decisions rely on professional judgments. Unless professionals work with their clients, this reliance can serve to disempower those whom the law was intended to protect. Though much debated, the legal definition of a person with a disability is unclear. This article examines the concept of disability and that of the least restrictive environment as well as that of the “most inclusive setting,” explains to whom they apply, discusses how they have been defined both in statutes and case law, and elaborates on the role of social workers as a result of the law’s reliance on professional judgment in ascertaining client rights.

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Although the disability rights movement relied on other civil rights precedents when advocating for the rights of people with disabilities, their

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needs have been viewed differently by legislators and the courts. First, there has been some debate over who should be included as a person with a disability. Further, some of the anti-exclusion and social justice efforts to promote the rights of people with disabilities such as the concept of “most inclusive setting” and least restrictive environment pose unique challenges for the United States that were not addressed when seeking to end discrimination for members of other historically discriminated groups. This includes the reliance on professional judgments when seeking to determine appropriate settings for either educational or medical services.¹ This poses unique challenges for people with disabilities, agencies, and social service providers seeking to address the needs of people with disabilities in an appropriate setting without furthering discriminatory practices.

As a result of historic inequalities and to promote social justice in the United States, the Supreme Court has held that laws that protect members of some groups, particularly women and racial minorities, should be reviewed using a different legal standard than other laws (*Brown v. Board of Education of Topeka*, 1954; *Craig v. Boren*, 1976; *Frontiero v. Richardson*, 1973; *Reed v. Reed*, 1971). The underlying assumption behind differentiating these groups of people by constructing “protected” or “semiprotected” classes of citizens is that higher levels of court scrutiny need to be used when laws differentiate people or differentially affect groups of citizens. Although the Supreme Court has not found people with disabilities to be a separate class that is eligible for such constitutionally grounded protections (*Cleburne v. Cleburne Living Center*, 1985), they have been granted freedom from unnecessary restraints in residential settings and the Supreme Court has found that their “liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint” (*Youngberg v. Romeo*, 1982). Congress has also enacted legislation to protect the rights of people with disabilities based on other civil rights statutes such as the Civil Rights Act (1964). Thus, Section 504 of the Rehabilitation Act of 1973, reauthorized in 1998, the Americans with Disabilities Act (ADA) of 1990, and the Individuals with Disabilities Education Act (IDEA), reauthorized in 2004 all provide protections for people with disabilities. Among other rights, these laws entitle citizens with disabilities to receive health care in the most integrated setting and educational services in the least restrictive environment.

Both the idea of education in the “least restrictive environment,” provided by IDEA (2004), and services in the “most integrated setting,” provided by the ADA (1992), are based on the least restrictive environment concept from the *Dean Milk v. Madison* (1951) case. Both rely on the notion that services, be they educational or medical, should not be provided in settings that are unnecessarily restrictive to people with disabilities; for example, government should not unfairly restrict or limit the access of people with disabilities from access to the larger world that includes both those with and

without disabilities. The concept of providing educational and medical services in a setting that is not overly restrictive requires professional assessments to be completed to determine the most appropriate setting in which one may receive such services.² There is no clear professional consensus as to what the least restrictive alternative means, but most analysts suggest that it includes the provision of services to people with disabilities in places where they can have more individual freedom (Fields & Ogles, 2002; Fisher, Geller, White, & Altaffer, 1995; Munetz & Geller, 1993). In this article, it is suggested that this particular need differentiates people with disabilities from other special populations that have been constitutionally protected (*Brown v. Board of Education of Topeka*, 1954; *Craig v. Boren*, 1976; *Frontiero v. Richardson*, 1973; *Reed v. Reed*, 1971) and protected by federal antidiscrimination legislation (Civil Rights Act of 1964, Title IX, 1972). However, rather than suggesting that this means a lower standard must be used, I suggest merely that the current court interpretation of these rights has provided unique challenges for people with disabilities, service providers, and states when implementing legislation to protect people with disabilities. Further, although federal and state standards can be developed to address the decision-making process, the rights of individuals regarding the least restrictive environment or most inclusive setting must ultimately be assessed on a case-by-case basis, based on individual needs. Because of this, people with disabilities may be reliant on professional judgment to help determine their right to be provided with services in less restrictive settings.

BASIC CIVIL RIGHTS

The American legal system is based on a system of individual rights (Palley, 2006). As a result, most laws that provide protections to vulnerable populations, including people with disabilities, are implemented by individuals or groups (as is the case with class actions) who feel that the laws have not adequately protected their individual rights. This individualistic approach can be contrasted with the more universalistic approach of the International Commission on Human Rights, which recognizes “the responsibility of Governments for removing or facilitating the removal of barriers and obstacles to the full integration and participation of persons with disabilities in society, and supporting their efforts to develop national policies to reach specific objectives” (United Nations Commission on Human Rights, 2000).

The 14th Amendment of the U.S. Constitution states that “no state shall . . . deny any person within its jurisdiction the equal protection of the laws.” This right is provided to individuals. As noted earlier, the Supreme Court has developed three different standards of review to ensure that no one within the United States is denied the protection of these laws.

The highest standard used to determine if a law violates the equal protection clause is referred to as strict scrutiny. Strict scrutiny is reserved for laws that threaten to violate fundamental rights such as voting or access to the courts and for statutes that classify people based on a suspect classification (e.g., race). Such laws are only permissible if they promote “a compelling government interest” (*Grutter v. Bollinger*, 2003). Statutes that classify people based on gender or illegitimacy are subject to intermediate scrutiny and will only be upheld if they substantially further “important governmental objectives” (*Craig v. Boren*, 1976). Other laws, those that do not prohibit rights that the Supreme Court has found to be fundamental and those that classify citizens into other categories such as age-based or disability-based categories are assessed only to the extent to which the purpose of the law bears “a rational relationship” to “a legitimate end” (*Cleburne v. Cleburne Living Center*, 1985). Laws that affect people with disabilities fall within this final category. In other words, it is easier for a law to discriminate against a person with a disability than someone who is a racial minority or a woman. However, people with disabilities have been provided with federally legislated protections to ensure that discrimination against them is limited (ADA, 1990; Americans with Disabilities Amendment Act [ADAA], 2008; Rehabilitation Act of 1973; Section 504, 1973).

Although they share similarities with constitutionally protected classes of citizens, such as women or people of color, people with disabilities have different rights. It is clear that all three groups have experienced historical discrimination and continue to experience discrimination (ADA, 1990;³ Francis & Silver, 2000; Herr, 2003). However, the Supreme Court has relied on a fundamental rights argument⁴ and on statutory protections to protect people with disabilities from discrimination (*Cleburne v. Cleburne Living Center*, 1985; *Youngberg v. Romeo*, 1982). They have not identified people with disabilities as a protected class or a semiprotected class, the legal standard that has traditionally been used to discern if a law is discriminatory toward minorities or women or on statutory protections provided by Section 504 of the Rehabilitation Act (*Southeastern Community College v. Davis*, 1979) or the ADA (*Olmstead v. L. C.*, 1999). In some ways, this makes the rights of people with disabilities weaker than those of other protected classes and more subject to the whims of Congress and the discretion of court interpretation of legislation.

Two major statutory protections that were written to prevent discriminating against people with disabilities are the assurances that they receive services, particularly medical in the most inclusive setting and educational services in the least restrictive environment. The original Supreme Court case in which the concept of the least restrictive environment was established was a commerce case about the distribution of milk (*Dean Milk v. Madison*, 1951). The court held that it was unconstitutional for state law to prohibit the distribution of milk into Madison, Wisconsin, to protect the public

health if there were other, less restrictive ways to protect public health. This protection of business rights was ultimately translated into statutes to ensure that government did not overly restrict the rights of people with disabilities to interact with the nondisabled.

These statutorily defined rights differentiate the needs of people with disabilities from those of other protected classes of citizens. Civil rights protections traditionally have required that people in minority populations receive the same treatment as the majority group. People with disabilities might find themselves in care settings that are not used by the general public. In addition, for them to receive care in the least restrictive setting, the agency or institution might be required to alter itself. The ADA clearly defines people with disabilities as “a discrete and insular minority” (ADA, 1990⁵). However, when dealing with race and gender, there is no occasion to address individual needs; therefore, legislative and court-based standards do not mention standards that must be applied to “individual needs.” When standards have been set for women and minorities, there is an assumption that the same basic interventions would be appropriate to ensure that they did not experience discrimination. This is not necessarily true for people with disabilities. As a result, when dealing with people with disabilities, even when uniform standards are created, they must be applied to people who require different types of interventions to meet their basic needs. The least restrictive appropriate environment for one person’s care or education is not automatically the same environment for another person with a disability, even the same disability. As a result, courts have interpreted the concept of the least restrictive environment or least restrictive alternative for care to require an assessment of individual need. The interpretation of this concept has proven to be a challenge for both legislators and judges.

DEFINING WHO IS A PERSON WITH A DISABILITY

Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

As noted previously, the concepts of the least restrictive environment (IDEA, 2004) and “the most integrated setting appropriate” have been supported by several pieces of federal legislation including the ADA (ADA, 1990; ADAA, 2008) and Section 504 of the Rehabilitation Act (1973/1998). The idea of both concepts is to include people with disabilities in inclusive settings to the extent that such inclusion is appropriate to meet their needs. To be eligible for care in the least restrictive environment or “most integrated setting,” one must first fall within the definition of a person with a disability (ADA, 1990; IDEA, 2004; *Olmstead v. L. C.*, 1999). This definition has been defined in statute by Section 504 (Rehabilitation Act of 1973/1998), the ADA (1990), and the IDEA (2004), and this definition has been interpreted by the courts.⁶

Although in her recent book, Colker (2005) provided evidence that Congress had no intention of providing vague definitions, she noted that the courts have used the strict language of the ADA without reference to Congressional proceedings to determine who qualifies as a person with a disability. In other words, even if Congress intended for the definition to be broad, the strict language of the law left significant room for court-level interpretation regarding who fits within the category of a person with a disability under the ADA. In response to the narrow interpretation that courts have been using to define disability, the ADAA (2008) was recently passed. This law explicitly overturned several Supreme Court cases and attempted to clarify the definition of a person with a disability. However, the interpretation of these amendments likely will still be subject to court interpretation.

The Rehabilitation Act of 1973 (amended in 1998)⁷ was the first major piece of federal legislation to address equal access and prohibit discrimination against people with disabilities.⁸ Therefore, it was the first piece of legislation to define a person with a disability for nondiscrimination purposes.⁹ It prohibits discrimination on the basis of one's disability only in federally financed programs. It specifically states that, "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" (Section 504, 1998).¹⁰ Francis and Silver (2000) noted that the main emphasis of the entire Rehabilitation Act (not simply Section 504) is helping people "overcome their personal limitations, not helping society overturn the limitations that biased practice imposes on the disabled" (p. xix). They further noted that the antidiscrimination piece of the Rehabilitation Act, Section 504, is purely secondary to the training piece. Whereas the Rehabilitation Act allocated federal money toward vocational training and rehabilitation, it did not allocate funds toward preventing antidiscrimination required in Section 504 (1973).

According to Section 504 of the Rehabilitation Act of 1973, a person with a disability is "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."¹¹ Section 504 defines major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹² As a result of considering "learning" as a major life activity, this law applies to all children in schools that receive any federal money. Importantly, the definition of a person with a disability also includes those who have a record of a disability or those who are regarded as having a disabling condition and, as such, receive discriminatory treatment (Section 504 of the Rehabilitation Act of 1973). The inclusion of this language suggests that one can be discriminated against based on the perceptions of others rather than an actual condition that might cause

one to experience limitations or in some way have one's ability differentiated from the general population.

The ADA (1990) also prohibits discrimination against people with disabilities particularly in employment, state and local government services, public accommodations, commercial establishments, and transportation. Essentially, it extends the protections that were provided for federally funded services by Section 504 of the Rehabilitation Act to services provided by state and local governments and those provided by private entities. Under the ADA, enforcement agencies also have the power to withhold federal funds from noncompliant state and local agencies.¹³ The ADA includes several parts. Title II relates to the provision of state and locally based government-provided services, those that are required to be provided in the least restrictive environment; therefore it is the most relevant section of the ADA for this article. Title II part A provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the service, programs, or activities of a public entity, or be subjected to discrimination by any such entity."¹⁴ A public entity is defined as "(A) any state or local government; (B) any department, agency, special purpose district (and) or other instrumentality of a State or States or local government."¹⁵ The definition of a disability under the ADA is similar to that of the Rehabilitation Act. It is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."¹⁶

The ADA (1992) further defines a physical or mental impairment as

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.¹⁷

Similar to Section 504, it explains that major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹⁸

Stated more simply, all people who suffer from arthritis, mental illness, or heart disease may not be considered disabled for the purpose of these laws, only those whose disabilities limit their abilities to perform major life activities or whose disabilities are perceived to cause such a limitation. The inclusion of those with a record of a disability and those "who are regarded as having a disability" seems to be more in line with discrimination against

other special populations, who are being protected against discrimination purely on the basis of prejudice that has been incurred as a result of categorically recognizable differences (e.g., race and gender).

The existing case law supports the interpretation that it is the effect of the condition rather than the condition itself that makes one disabled. The only Title II Supreme Court case to address the issue of discrimination against people with disabilities was *Olmstead v. L. C.* (1999; hereafter referred to as *Olmstead*). In *Olmstead*, the Supreme Court reiterated that:

Title II provides only that “qualified individuals with a disability” may not “be subjected to discrimination” (42 U.S.C. § 12132). “Qualified individuals,” the ADA further explains, are persons with disabilities who, “with or without reasonable modifications to rules, policies, or practices, . . . meet the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity” (42 U.S.C. § 12131).¹⁹

In other words, one must first be eligible for services and be a “qualified individual with a disability” before one can claim that he or she has experienced discrimination.

Most of the other case law that has addressed the issue of who is a person with a disability has sought to clarify this language as it relates to employment discrimination, which is covered in Title I of the ADA as opposed to Title II, which addresses access to public services. These decisions are relevant to Title II cases and potentially to other disability rights cases as they are the only Supreme Court cases to attempt to define the term disability.

In defining a person with a disability for purposes of the ADA, the Supreme Court found that if one’s disabling or limiting condition can be ameliorated with medical care (*Murphy v. U.S. Postal System*, 1999), assistive technology (*Sutton v. United Airlines*, 1999), or personal compensatory skills (*Albertsons v. Kirkenberg*, 1999), one will not qualify for ADA protections (Palley & Rozario, 2007). They also held that any disability must be both “substantial” and “long term” (*Toyota v. Williams*, 2002). However, in 2008, the ADAA was passed, which explicitly overturned *Sutton v. United Airlines* (1999) and *Toyota v. Williams* (2002). Congress and the President rejected the Supreme Court’s interpretation of the definition of the strict interpretation of major life activities and they eliminated the court’s consideration of ameliorating effects of mitigating factors on the definition of disability. This definition, of course, has implications for who should be provided care in the least restrictive alternative.

Francis and Silver (2000) argued that the case law “understand[s] disability to be the property of the individual” (p. xxiv) rather than societal biases against people with different abilities. This approach is largely based on the

individual rights perspective that is inherent in American law (Palley, 2006). In other words, the court interpretation can be understood to contradict the statutory language. This is, at least in part, based on the difficulty courts have addressing the varying accommodations needed by people with disabilities. Although the recent ADA amendments (ADAA, 2008) have attempted to clarify the definition of a person with a disability, it is likely that this definition will remain the subject of case law debates.

The Individuals With Disabilities Education Act (2004)

Children with disabilities are also protected by the IDEA (2004), a piece of disability legislation that applies only to children in schools that receive federal money. It ensures the rights of children with disabilities in schools to receive “appropriate educational services.” The IDEA (2004) was established to ensure that children with disabilities did not experience discrimination in their learning environments. It mandates that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.”²⁰ According to IDEA, a child must both have a disability and, because of the disability, need special education and related services. The determination of a disability is based on evaluations as well as the decision of a school team, including the child’s parents or guardians. If the disability does not cause the child to need special education services, the child will not be considered disabled for purposes of the IDEA (2006).²¹ In this instance, a child might still be recognized as disabled under Section 504 of the Rehabilitation Act or the ADA.

According to the IDEA (2006), the definition of a child with a disability includes a child who is diagnosed with

mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.²²

In other words, the disabling condition does not, in and of itself, create a right to special education services, but rather, those who have a disability that creates a need are entitled to receive services. This requires that there be some professional assessment of need. This obviously differs from the integration mandate of *Brown v. Board of Education* (1954), in which it was assumed that all Black students were entitled to be educated, and could be appropriately educated in a nonsegregated setting. As with the Rehabilitation Act of 1973 (Section 504, 1998) and the ADA (1990), it is not the condition

itself that provides a child with special rights, but rather the perceived effect (by professional evaluators, teachers, and parents) of the condition on a child's ability to learn.

Although the plain language of the IDEA more clearly defines who falls into the category of a child with a disability than does either Section 504 or the ADA, there is still room for interpretation. Although the Supreme Court has not specifically addressed the issue of defining a child with a disability, this issue has been addressed by several lower courts. For example, in the Second Circuit, the court held that J. D., a child who experienced significant mental health problems, was not a child with a disability because neither his grades nor achievement tests indicated that his emotional illness was affecting his abilities in school. In other words, they found that he did not fit within the criteria of having an emotional disability because his disability did not have "adverse effects" on his academic performance (*J. D. v. Pawlett School District*, 2000). As a result, J. D. would not be entitled to services in the least restrictive environment if he had sought such services.

Understanding the definition of a person with a disability is important when assessing the least restrictive environment or most inclusive setting mandates because these mandates apply only to people who are identified by law as people with disabilities either as adults receiving community or institutional care or children in schools. Anyone who receives publicly funded institutional care is presumably a person with a disability or he or she would not be eligible for Medicaid reimbursements (Batavia, 2002; Palley & Rozario, 2007). Further, someone who is unnecessarily institutionalized and, as such, does not suffer from an inability to perform a major life activity would presumably be included under Section 504 and the ADA's definition as someone who is experiencing discrimination based on the perception of a limitation. The need to fit into a statutorily defined and court-based interpretation of a group member (e.g., a person with a disability) distinguishes people with disabilities from other constitutionally protected groups such as women or racial minorities and makes their legal protection from discrimination more fragile than that of constitutionally recognized group members.

This has implications for people with disabilities as well as agencies where people with disabilities are employed and those who provide services to people with disabilities because it is not always clear to the agency whose civil rights must be protected, or who fits into the category of a person with a disability.

THE LEAST RESTRICTIVE ENVIRONMENT

If a person fits into the legal definition of a person with a disability, federal law (ADA, 1990; IDEA, 2004; Section 504 of the Rehabilitation Act of 1973) requires that they be included with nondisabled populations to the greatest

extent possible as long as they can receive adequate care or educational services in such a setting. All of the major disability laws suggest that not to facilitate the inclusion of people with disabilities into mainstream society is discriminatory. This legal judgment does not consider the desires of people with disabilities or those of their guardians. For example, a person with a disability might feel safer in a more restrictive setting because he or she can receive 24-hour medical monitoring, or a parent might feel that his or her child can be better educated in a setting where he or she will not have to deal with the social pressures that accompany a mainstream educational setting. Ideally, the determination of an appropriate setting for education or care would consider the safety concerns of the person with a disability. However, if a less restrictive setting is deemed to be either educationally or medically appropriate (the discussion of how this occurs follows), the law provides no space for an individual or his or her advocate to seek a more restrictive setting despite the wishes of the person with a disability.

THE MOST APPROPRIATE INTEGRATED SETTING

The main purpose of Section 504 of the Rehabilitation Act of 1973 is, “to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.”²³ Further, it contains an integration mandate that states that, “[r]ecipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.”²⁴ The ADA took much of its language from Section 504. Title II states that a public entity shall not “[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others,”²⁵ and further that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity,”²⁶ In other words, unless service provision requires changes that amount to a “fundamental alteration” of an existing program, people with disabilities are entitled to receive services in the most inclusive setting. This language creates challenges for implementers. Not only must they discern who fits into the category of a person with a disability, they must also assess what is “reasonable” to alter and what is “a fundamental alteration.” The guidelines they have are based on case law and thus include case specific facts that might or might not be similar to the issue at hand with which they must deal. Further, as noted earlier, these legislative policies might serve to disempower people with disabilities. Using effective clinical practice and developing case

plans with clients, as opposed to for clients, can help ameliorate some of this disenfranchisement.

As noted previously, in 1999, the Supreme Court in its decision in *Olmstead v. L. C.* first addressed the issue of providing services, covered under the ADA, to people with disabilities in the most inclusive setting. The case involved two women in an institutional setting for whom professionals had recommended community-based care. These women had spent 2 years on a waiting list for community-based services. The Supreme Court ultimately held that this practice was discriminatory because these women were receiving services in a more restrictive environment than was necessary. Changing services for these women was not considered a fundamental alteration of the existing program because the state already provided community-based support services to other similarly situated people. Further, professional recommendations were heavily relied upon in making this decision (*Olmstead v. L. C.*, 1999).

The Supreme Court noted that with regard to determining the appropriate level of care for people with disabilities, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual ‘meets the essential eligibility requirements’ for habilitation in a community-based program” (*Olmstead v. L. C.*, 1999). The Court further stated that reasonable modifications were required “to avoid discrimination” against people with disabilities. The court specifically noted that it would not require “fundamental alterations” of existing programs. When determining fundamental alterations, the Court held that states can balance the cost of providing services in the least restrictive environment for individuals against the cost of providing other services to the entire population of people receiving similar care to determine if the services are a fundamental alteration of existing programs (*Olmstead v. L. C.*, 1999).

The ADA (1990) and the *Olmstead* (1999) decision provide reasonable modifications of existing programs to ensure that services to people with disabilities are provided with aids and services in the least restrictive environment. However, states need not fundamentally alter their existing services. This contradiction poses a dilemma for the provision of services to people with disabilities. In some ways, the Supreme Court has said that if changing a discriminatory system is too burdensome on the state, the state may not be required to provide services to people with disabilities in a nondiscriminatory manner. This conflict is related to the individual nature of the needs of people with disabilities regarding the most inclusive setting. Congress and appellate courts can set standards for determining the least restrictive environment for education or most inclusive setting for care, but ultimately they rely on the judgment of professionals to determine what might be appropriate for individuals (*Olmstead v. L. C.*, 1999).

Most of the case law following *Olmstead* relates to the determination of what a “fundamental alteration” of an existing program is. Three circuits have protected the rights of those with disabilities to receive services in

the community (*Fisher v. Oklahoma Health Authority*, 2003; *Frederick L. v. DPW of Pennsylvania*, 2004; *Townsend v. Quasim*, 2003), and one has found that such protections would amount to a fundamental alteration of existing programs and, as such, cannot be mandated (*Rodriguez v. New York*, 1999²⁷).

The 10th Circuit held that a Medicaid waiver program that limited the number of prescriptions people could obtain in the community to five was discriminatory and preventing such a limit did not amount to a fundamental alteration of an existing program. The 10th Circuit also noted that increasing cost of care alone did not amount to a fundamental alteration (*Fisher v. Oklahoma Health Authority*, 2003). In addition, the 9th Circuit held that deciding that something was a fundamental alteration simply because of the costs it would incur was discriminatory. They found that by differentiating between “medically needy” and “categorically needy,” and by providing community-based care only to those who were designated as “categorically needy,” Washington State’s Medicaid policy was discriminatory. The 9th Circuit also held that “unless the Secretary can demonstrate that extending eligibility to these people would fundamentally alter its Medicaid program,” they cannot be excluded from eligibility for community-based care (*Townsend v. Quasim*, 2003). The 3rd Circuit held that because the State of Pennsylvania did not have a clear timeline indicating when community integration of the mentally ill might occur, they could not rely on the fundamental alteration defense and needed to increase the number of community-based care settings for mentally ill patients who did not require institutionalization (*Frederick L. v. DPW of Pennsylvania*, 2004).

On the other hand, the 2nd Circuit held that creating a new Medicaid service to monitor the safety of people with mental health disabilities living in the community would amount to a “fundamental alteration” of an existing program (*Rodriguez v. New York*, 1999). This decision was partially based on the costs that would be incurred in changing the existing systems (*Rodriguez v. New York*, 1999).

Despite the class action nature of many of these cases, the application of the most inclusive setting standard in the ADA requires system flexibility to meet individual needs. This exists in sharp contrast to civil rights programs for women and minorities in which individually based needs were not recognized. All women and all Blacks were eligible for the same services or protections. In fact, as in the case of school integration, there was an assumption that fundamental alterations were needed to include Blacks into previously segregated school systems (*Brown v. Board of Education*, 1954; The Civil Rights Act of 1964). The whole issue of a fundamental alteration defense in the ADA suggests that there are instances when the individual right of a person with a disability not to experience discrimination might be limited because the system would have to change to protect that person’s civil liberties. For example, in New York, courts found that creating new programs and

expanding existing programs to facilitate community integration of individuals with mental illness were fundamental alterations of existing programs. In other words, in these instances it was okay for states to discriminate against individuals who might be better served, and less restricted in community-based programs. This standard distinguishes people with disabilities from constitutionally protected groups and often provides states and agencies with an unclear guideline regarding how much they must do to provide inclusive services for people with disabilities.

LEAST RESTRICTIVE ENVIRONMENT

The IDEA requires that educational services be provided in the least restrictive environment. Most IDEA cases are individually based rather than based on class actions. Further, the IDEA does not provide a fundamental alteration defense for states or school systems. The IDEA (2004) states that

to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities are educated with children who are not disabled . . . or removal of children with disabilities occurs only when the nature and severity of the disability is such that education in the regular classes with the use of supplemental aids and services cannot be satisfactorily achieved.²⁸

As with the Rehabilitation Act and the ADA, the statutory definition requires professional judgment of the appropriate level of inclusion for each individual student.

The first Supreme Court case to address the interpretation of the IDEA (*Board of Education of Hendrick Hudson v. Rowley*, 1982) demonstrated a preference toward inclusion. However, the U.S. Supreme Court has not directly addressed the IDEA's least restrictive environment mandate. As a result, it has been interpreted differently by the Federal Courts of Appeals. In some places, the issue of cost is a defense, but in others it is not. For example, the 9th Circuit developed a four-part test to determine if a child is being educated in the least restrictive environment. First, they considered the benefits of a segregated and a nonsegregated setting. Then, they considered the benefits for the student of social interaction with nondisabled peers. Then, the court evaluated effect of the presence of the child on others in the class. Finally, the court considered the costs that would be incurred by including the child in a mainstream setting (*Sacramento City School District v. Rachel H.*, 1994). On the other hand, the 6th Circuit has shown a preference toward inclusion. To determine the least restrictive appropriate environment to deliver educational services to children with disabilities, the 6th Circuit suggests determining whether the services that are being provided in a segregated program can be provided in a nonsegregated program; if so, they find a

preference toward inclusion (*Roncker v. Walters*, 1983). As a result of the variation between the tests developed to implement the least restrictive environment mandate in these districts and others, the standards for determining the least restrictive educational environment depend on one's perceived individual needs as well as the circuit in which one resides. In other words, this concept provides no clear right that is available to all students. As a result, the professional judgment of professionals, including social workers, can have a large impact on the rights available to people with disabilities.

CONCLUSION

The challenge people with disabilities, courts, and social service agencies face in protecting the interests of people with disabilities to receive care or education in the least restrictive environment or most inclusive setting requires the alteration of existing systems so that services can address individual needs. This challenge is basically to uphold the United Nations Universal Human Rights Commission's statement on how civilized societies should address the needs of their citizens with disabilities. However, given the limitations of the American legal system, in the case of the ADA, agencies must first identify who is entitled to statutory protection. According to the decision in *Olmstead* (1999), this in part relies on professional judgment. Unless social service providers and other health care professionals work with their clients in making their professional judgments, this reliance could serve to disempower people with disabilities.

An additional obstacle is that different professions might put greater or less emphasis on potential strengths or weaknesses of their clients when making a professional assessment of the most appropriate setting in which a person with a disability should receive care or educational services. For example, an educator might focus on academic skills, a social worker or other mental health provider might focus more heavily on psychosocial needs, and a medical professional might focus more heavily on physical health concerns. Social workers need to be aware of these potential obstacles and work to ensure that their clients' voices are included in the assessment process.

Although rights that protect specific groups of citizens from discrimination have been granted to people with disabilities by federal legislation, in the case of the IDEA, the standards for providing the least restrictive environment remain judicially defined in inconsistent ways. Although the ADA and its judicial interpretation might be clearer regarding the most inclusive setting than the IDEA is regarding the least restrictive environment, the current interpretation of the ADA allows states to limit the extent to which they alter programs to meet the needs of people with disabilities, in part, based on expenses. In Title II of the ADA, the issue of cost was not identified by Congress in the plain language of the statutes but rather by judicial opinions

(*PA Protection and Advocacy v. Pennsylvania Department of Public Welfare*, 2005; *Rodriguez v. New York*, 1999). Clearly, the type of societal restructuring needed to ensure the inclusion of people with disabilities in the least restrictive alternative or most inclusive setting might initially be expensive and require some existing institutional structures to be changed.

Programs to facilitate the inclusion of racial minorities and women in the mainstream did not require new strategies and locations for care or education based on individual needs. Neither group required “care” and the integration of schools did not require the structure of classroom teaching to be altered, but rather that it become inclusive of all, that Black children be able to attend the schools that were created either by de jure or de facto decisions as Whites-only schools. The idea behind these changes was that by busing or adding women’s bathrooms, existing institutions could be made accessible to minorities or women. There was no consideration of individually differing needs because women and Blacks ostensibly required the same things that White men required to be included in mainstream educational and employment settings.²⁹ The issues of care in the most inclusive setting creates an additional potential governmental expense that has been, and could continue to be, limited by the fundamental alteration argument. Because the inclusion needs of people with disabilities are varied and because their rights have not been constitutionally grounded (*Cleburne v. Cleburne Living Center*, 1985), they are somewhat more fragile than those of other specially protected populations.

Finally, the need to address individual differences of people with disabilities in environments that often do not serve the general public (e.g., residential group homes or restrictive school settings) further differentiates people with disabilities from other groups that have sought protection from discrimination based on group membership. By this, I do not mean to suggest that this group is not as deserving of being included as were Blacks and women; rather, when dealing with inclusion of people with disabilities there are additional factors that must be addressed that were not addressed in the civil rights era when dealing with the inclusion of minorities and women. Further, social workers and other social service providers who work with people who have disabilities need to be aware of the limitations of the laws as well as their own professional role in influencing the legal rights of their clients to successfully advocate for their clients’ needs.

NOTES

1. Though this reliance exists in the law, it should be noted that most people with disabilities do not want to be acted upon or reliant upon professionals.

2. IDEA, 34 C.F.R. § 300.552, 2006; *Olmstead v. L.C.*, 527 U.S. 581, 1999.

3. ADA, P.L. 103-336, Sec. 2(a), 1990.

4. In other words, these decisions have been based on whether the laws which were challenged bear a rational relationship to a legitimate government end.

5. ADA, 42 U.S.C. § 2101(a)(7), 1990.

6. These interpretations have limited the rights of people with disabling conditions to be defined as disabled within the context of the ADA.

7. Though the Rehabilitation Act of 1973 was amended in 1998, the main changes occurred in Section 508. Section 504 remains essentially the same as it was when it was originally authorized in 1973.

8. Although the National Defense Act (1916) and the National Rehabilitation Act of 1920 both recognized some limited rights for people with disabilities, these laws were limited to providing vocational training, occupational adjustments, money for prosthetics and job placement services. They were not large scale anti-discrimination laws.

9. Supplemental Security Insurance (SSI) which was originally passed in 1972 and Social Security Disability Insurance (SSDI) which was originally passed in, 1954 both defined a person with a disability to be eligible for benefits based on limited work ability but not for non-discrimination purposes (Social Security Advisory Board, 2003).

10. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, 34 C.F.R. § 104.4(a), 1998.

11. Section 504 of the Rehabilitation Act, 34 C.F.R. § 104.3(j) 1998.

12. Section 504 of the Rehabilitation Act, 34 C.F.R. § 104.3(j) (2) (iii), 1998.

13. ADA, 28 C.F.R. § 35.164, 1992.

14. ADA, P.L. 103-336, 1990.

15. ADA, P.L. 103-336, 1990.

16. ADA, 28 C.F.R. § 35.104, (4), 1992.

17. ADA, 28 C.F.R. § 35.104 (2), 1992.

18. ADA, 28 C.F.R. § 35.104 (2), 1992.

19. *Olmstead v. L. C.* 527 U.S. at 589, 1999.

20. IDEA, 34 C.F.R. § 300.534, 2006.

21. IDEA, 34 C.F.R. § 300.8(a), 2006.

22. IDEA, 34 C.F.R. § 300.8(a), 2006.

23. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), 1998.

24. Section 504 of the Rehabilitation Act, 28 C.F.R. § 41, 1998.

25. ADA, 28 C.F.R. § 103 (b) (1) (iii), 1992.

26. ADA, 28 C.F.R. § 103 (b) (7), 1992.

27. *Rodriguez v. NY*, 197 F. 3d. 611, 2nd Cir., 1999.

28. IDEA, 20 U.S.C. § 1412 (5), 2004.

29. The assumption was that these groups of citizens could be integrated into the existing institutions without changing the institutional structures (e.g. housing, schools, and employment). If there had been some recognition that to do this effectively might require some modification to existing institutions, and that these modifications might have an initial cost, it is possible that the inclusion of women and racial minorities into employment situations would have been more successful. It is also possible that such a high percentage of minority children would not currently be identified as children with disabilities.

REFERENCES

Albertsons v. Kirkenberg 527 U.S. 551 (1999).

Americans with Disabilities Act, 42 U.S.C. § 12132 (1990); 28 C.F.R. § 35 (1992).

Americans with Disabilities Amendment Act of 2008, Pub. L. No. 110-325. Retrieved November 18, 2008, from <http://www.govtrack.us/congress/bill.xpd/bill=s110-3406>

Batavia, A. (2002). A right to personal assistance services: "Most integrated setting appropriate" requirements and the independent living model of long term care. *American Journal of Law and Medicine*, 27, 17-42.

Board of Education of Hendrick Hudson v. Rowley, 458 U.S. 176 (1982).

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

- Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964).
- Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).
- Colker, R. (2005). *The disability pendulum: The first decade of the Americans with Disabilities Act*. New York: NYU Press.
- Craig v. Boren, 429 U.S. 190 (1976).
- Dean Milk Co. v. Madison, 340 U.S. 349 (1951).
- Fields, S. & Ogles, B. (2002). The system of care for children and the least restrictive alternative: Legal origins and current concerns. *Children's Services: Social Policy, Research and Practice*, 5(2), 75–93.
- Fisher, W., Geller, J., White, C., & Altaffer, F. (1995). Servicing the seriously mentally ill in the LRA: Issues from a federal court consent decree. *Administration and Policy in Mental Health*, 22, 423–436.
- Fisher v. Oklahoma Health Authority, 335 F.3d 1175 (10th Cir. 2003).
- Francis, L. & Silver, A. (2000). Achieving the right to live in the world: Americans with disabilities and the civil rights tradition. In L. Francis & A. Silvers (Eds.), *Americans with disabilities: Implications for individuals and institutions* (pp. xiii–xxx). London: Routledge.
- Frederick L. v. DPW of Pennsylvania, 364 F.3d 487 (3rd Cir. 2004).
- Frontiero v. Richardson, 411 U.S. 677 (1973).
- Grueter v. Bolinger, 288 F.3d 732 (2003).
- Herr, S. (2003). The potential of disability non-discrimination laws. In S. S. Herr, L. O. Gostin, & H. H. Koh (Eds.), *The human rights of persons with intellectual disabilities: Different but equal*. Oxford, UK: Oxford University Press.
- Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2004), 34 C.F.R. § 300.534 (2006).
- J.D. v. Pawlett School District, 224 F.3d 60 (2nd Cir. 2000).
- Munetz, M. R. & Geller, J. L. (1993). The least restrictive alternative in the postinstitutional era. *Hospital and Community Psychiatry*, 44, 967–973.
- Murphy v. U.S. Postal System, 527 U.S. 517 (1999).
- Olmstead v. L. C., 527 U.S. 581 (1999).
- PA Protection and Advocacy, Inc. v. PA Dept of Public Welfare. (2005 US App. Lexis 4810, 3rd Cir. 2005).
- Palley, E. (2006). Challenges of rights based law: Implementing the least restrictive environment mandate. *Journal of Disability Policy Studies*, 16, 229–235.
- Palley, E. & Rozario, R. (2007). The Olmstead decision: The implications of the Olmstead decision on housing and elder care. *Journal of Gerontological Social Work*, 49, 81–96.
- Reed v. Reed, 404 U.S. 71 (1971).
- Rehabilitation Act of 1973 (reauthorized in 1998), Section 504, 29 U.S.C. § 794; 34 C.F.R. § 104.
- Rodriguez v. New York, 197 F.3d 611 (2nd Cir. 1999).
- Roncker v. Walters, 700 F.3d 1058 (6th Cir. 1983), *cert denied* 464 U.S. 864 (1983).
- Sacramento City School District v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).
- Southeastern Community College v. Davis, 442 U.S. 397 (1979).
- Sutton v. United Airlines, 527 U.S. 471 (1999).
- Title IX, Education Amendments of 1972, Title 20 U.S.C. § 1681–1688.
- Townsend v. Quasim, 328 F.3d 511 (9th Cir. 2003).

Toyota v. Williams, 534 U.S. 184 (2002).

United Nations Commission on Human Rights. (2000). *Human rights of persons with disabilities*. Retrieved October 8, 2008, from [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2000.51.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2000.51.En?Opendocument)

Youngberg v. Romeo, 457 U.S. 307 (1982).

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